HARVARD
LAW REVIEW

VOL. XXXII MARCH, 1919 NO. 5

THE RESPONSIBILITY OF THE STATE IN ENGLAND

TO ROSCOE POUND

I

THE British Crown covers a multitude of sins. "The King," says Blackstone in a famous sentence,[1] "is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." A long history lies behind those amazing words; and if, as to Newman,[2] they seem rather the occasion for irony than for serious political speculation, that is perhaps because their legal substance would have destroyed the argument he was anxious to make. In England, that vast abstraction we call the state has, at least in theory, no shadow even of existence; government, in the strictness of law, is a complex system of royal acts based, for the most part, upon the advice and consent of the Houses of Parliament. We technically state our theory of politics in terms of an entity which has dignified influence without executive power. The King can do no wrong partly because, at a remote period of history, the place where alone the doing of wrong could best be righted was his place, and had won preëminence only after a long struggle with the courts of lesser lords. The King's courts became the supreme resort of justice simply because, in his hands, that commodity

[1] 1 COM., 1813 ed., 254.

[2] THE PRESENT POSITION OF CATHOLICS IN ENGLAND, 27 *f.*

was more purely wrought and finely fashioned than elsewhere; and since it is clearly unintelligent to make a man judge in his own cause, since, moreover, the royal judges do not, in legal fact, conceal the royal presence, there seems to have been no period of history in which the King could be sued in the courts of the realm.

It is difficult to say at what precise period this non-suability of the Crown passed into infallibility. The Tudor despotism seems to have been that critical period of transition when learned lawyers like Plowden will talk what Maitland has aptly termed "metaphysiological nonsense;" [3] and the aggressive Coke will dispatch the Crown into a corporation sole of a kind but rarely known to previous English history.[4] Not, indeed, that men are not troubled by the consequences of that dual personality the Tudor lawyers called into being. Thomas Smith did not write aimlessly of an English commonwealth; [5] and that public which the royal burglary of 1672 forced into responsibility for the National Debt shows, clearly enough, that the fusion of Crown and state is not yet complete.[6] Even in the nineteenth century Acts of Parliament will be necessary to show that behind the robes of a queen can be discerned the desires of a woman.[7]

It is probable that the reëmergence of the dogma of divine right exercised a potent influence on this development. Certainly men could not have encountered the speech of James and his eager adherents, or the logic of that continental absolutism which is merely summarized in Bossuet, without being affected by them. Even when the Revolution of 1688 destroys its factual basis, it has become capable of transmutation into a working hypothesis of government; and anyone can see that Blackstone, who best sums up the political evolution of this creative period, writes "Crown" where the modern political philosopher would use the term "State." The vague hinterland of ancient prerogative went also, doubtless, to show that the Crown is a thing apart. The privilege of the King's household leaped to the eyes.[8] His

[3] 3 COLLECTED PAPERS, 249.

[4] *Ibid.*, 244-45.

[5] *Ibid.*, 253.

[6] 1 MACAULAY, HISTORY OF ENGLAND, Everyman's edition, 170.

[7] 25 & 26 VICT. c. 37 (1862); 36 & 37 VICT. c. 61 (1873).

[8] 2 Co. INST. 631, 4 *ibid.*, 24; Rex *v.* Foster, 2 Taunt. 166-67 (1809); Rex *v.* Moulton, 2 Keb. 3.

freedom from unpleasant proximity to arrest declared the sacred character with which he was invested.[9] "The most high and absolute power of the realme of England," says Sir Thomas Smith, not less learned, be it remembered, in the mysteries of law than of politics,[10] "consisteth in the Parliament;" but even so noteworthy an assembly cannot bind the Crown by its statutes.[11] Indeed, its position is even more privileged since the Crown, by prerogative, takes advantage of statute.[12] Fictions [13] and estoppel [14] pale into insignificance before the overmastering power of its presence. Laches [15] and prescription [16] lose their meaning when the Crown has become desirous of action. It chooses its own court; [17] it may, save where, of its own grace, it has otherwise determined,[18] avoid the payment of costs.[19] Here, assuredly, is a power that does not need the sanction of collective terminology that men may recognize its strength.

Prerogative such as this would be intolerable did the Crown act as in theory it has warrant. But the English have a genius for illogical mitigation; and the history of ministerial responsibility enshrines not the least splendid contribution we have made to the theory of representative government. The seventeenth century in England makes definite a practice which, if irregular in its operation, can yet trace its pedigree back to the dismissal of Longchamp in 1190; [20] the execution of Strafford and the impeachment of Danby are only the two culminating peaks of its development. What ministerial responsibility has come to mean is that the King's ministers shall make answer for the advice they proffer and the acts which flow therefrom; and in the period in which the royal power is delegated, for practical purposes, to the Cabinet we have herein a valuable safeguard against its arbitrary abuse.

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[9] 3 BL. COM. 289.
[10] DE REPUBLICA ANGLORUM, ed. Alston, 48.
[11] Magdalen College Case, 11 Co. Rep. 66; Sheffeild *v.* Ratcliffe, Hob. 334.
[12] Rex *v.* Cruise, 21 Ch. 65 (1852).
[13] Anon., Jenk. 287 (1613).
[14] Coke's Case, Godb. 289.
[15] Co. LITT., 57 *b.*
[16] Wheaton *v.* Maple, [1893] 3 Ch. 48.
[17] 4 Co. INST. 17; 1 BL. COM. 257.
[18] 23 & 24 VICT. c. 34.
[19] Johnson *v.* Rex, [1904] A. C. 817.
[20] STUBBS, CONSTIT. HIST., 6 ed., I, 539.

Yet ministers are not the Crown. What they urge and do does not, however politically unwise or legally erroneous, involve a stain upon the perfection of its character. It may be true that when they order action, the Crown has, in substance, been brought into play; but the responsibility for their acts remains their own since the King can do no wrong. The law knows no such thing as the government. When the King's ministers find their way into the courts it is still a personal responsibility which they bear. Statutory exceptions apart, no such action need cause a moment's qualms to the grim guardians of the royal treasury; the courts' decision does not involve a raid upon the exchequer.

In such an aspect, state-responsibility, in the sense in which continental theorists use that term, remains unknown. The state cannot be sued, because there is no state to sue. There is still no more than a Crown, which hides its imperfections beneath the cloak of an assumed infallibility. The Crown is irresponsible save where, of grace, it relaxes so stringent an attitude. Foreign writers of distinction have thus found it easy to doubt whether the protection the English constitutional system affords to its citizens is in fact as great as the formal claims of the "rule of law" would suggest.[21] For while it is clear enough that the broad meaning of this principle is the subjection of every official to definite and certain rules, in the nature of things that which gives the official his meaning and is equivalent in fact to the incorporation of the people as a whole, escapes the categories of law.

Nor is this all. Careful analysis of the responsibility of a public servant suggests that the rule of law means less than may at first sight appear. There has been unconsciously evolved a doctrine of capacities which is in its substance hardly less mystical than Plowden's speculations about the kingly person. Certain protections are offered to the King's servants which go far to placing them in a position more privileged than the theory underlying the rule of law would seem to warrant. The growth, moreover, of administrative law in the special evolution characteristic of the last few years is putting the official in a position where it becomes always difficult and often impossible for the courts to examine his acts. We have nothing like the *droit administratif* of

[21] M. LEROY in LIBRES ENTRETIENS, 4me series, 368.

the Continent of Europe; but we are nevertheless weaving its obvious implications into the general system of our law.

It is easy to understand that in the days when the functions of government were negative rather than positive in character, the consequences of its irresponsibility should hardly have pressed themselves upon the minds of men. For it is important to have constantly before us the fact that the essential problem is the responsibility of government. Our English state finds its working embodiment in the Crown; but if we choose to look beneath that noble ornament we shall see vast government offices full of human, and, therefore, fallible men. We choose to ignore them; or rather we know them only to make them pay for errors they have not committed on their own behalf. So do we offer vicarious victims for a state that hides itself beneath an obsolete prerogative.

Public money is, of course, a trust; and it is perhaps this that has involved the retention, in relation to the modern state, of a notion the antiquarian character of which is obvious the moment the real machinery of government is substituted for the clumsy fiction of the Crown. Public money is a trust; and thus it was that until the nineteenth century things less than the state, like charitable institutions, were beyond liability for the acts of their servants. But *Mersey Docks Trustees* v. *Gibbs* [22] emphasized, half a century ago, that defective administration in any enterprise not conducted by the Crown must entail its just and natural consequence. It is but obvious justice that if the public seek benefit, due care must be taken in the process not to harm the lesser interests therein encountered. It is a matter not less of political than of economic experience that the enforcement of liability for fault, often, indeed, without it,[23] is the only effective means to this end. Where we refuse to take the state for what it in fact is, all we do is to make it superior to justice. Responsibility on the part of the Crown does not involve its degradation; it is nothing more than the obvious principle that in a human society acts involve consequences and consequences involve obligations. We are invested with a network of antiquarianism because the conceptions of our public law have not so far developed that they meet the new facts they encounter. We, in a word, avoid the pay-

[22] L. R. 1 H. L. 93 (1866).

[23] *Cf.* Laski, 26 YALE L. J. 105 *f.*

ment of our due debts by a shamefaced shrinking behind the kingly robe we have abstracted from the living ruler.

It is well to analyze the meaning of responsibility before we examine our remoteness from it. The modern state is, in the American phrase, nothing so much as a great public-service corporation. It undertakes a vast number of functions — education, police, poor-law, defense, insurance against ill-health and unemployment — many of which, it is worth while to note, were, in the past, provided for by private endeavor. State-acts are performed by individuals, even though the act is invested with the majesty of the Crown; for an abstract entity must work through agents and servants. To-day such acts are protected from the normal consequence of law. Often enough, indeed, the individual agent is not so protected; if he drives a mail van recklessly down the street he can be sued as a private person. But we cannot penetrate through him to the master by whom he is employed. The resources of the Postmaster-General are not at our disposal for the accidents that may be caused by the acts of his servants.[24] Yet, in real and literal fact, these acts are not a whit different from those of other men. The Postmaster-General may be the depositary of special powers; but that should surely cast upon him rather a greater obligation than a freedom from responsibility for their exercise.

The theory of responsibility is, in this regard, no more than a plea that realism be substituted in the place of fiction. It urges that when the action of the state entails a special burden upon some individual or class of men, the public funds should normally compensate for the damage suffered. Everyone can see that if the state took over the railways it would be unfair to refuse the continuance of actions by those who had on some account previously commenced them; nor is it less clear that if a postal van runs over Miss Bainbridge she has, in precisely similar fashion, a claim that should not go unanswered. There must, in short, be payment for wrongful acts; and the source of those acts is unimportant. We can, indeed, see that there are reasonable grounds for certain exceptions. Complete freedom of judicial expression, without any penalization of utterance, is too clear a need to demand defense. In a less degree, a member of Parliament needs protection from the normal consequence of law, if he is at all fully to perform

[24] Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178.

his function; though, even here, experience suggests the value of some extra-parliamentary means whereby the member can be made to weigh his words.[25] Still, in general, the principle is clear. Government must pay where it wrongs. There are no arguments against it save, on the one hand, the dangerous thesis that the state-organs are above the law, and, on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need. Dogmas, no less than species, have their natural evolution; and it may well result in serious injustice if they linger on in a condition of decay.

II

The personal liability of the Crown to-day is, broadly speaking, not merely non-existent in law, but unimportant also in political fact. No king is likely, as in Bagehot's classic illustration, to shoot his own Prime Minister through the head; though the servants of Elizabeth and her boisterous father must not seldom have stood in fear of personal violence. The real problem here concerns itself with government departments. They are the constitutional organs of the Crown, and their acts are binding upon it. But how are they to be reached if an injured person deem that he has suffered injustice? The law is clear upon this point beyond all question. The subject cannot bring action against the Crown, because the Crown can do no wrong. A government department lives beneath the widespread cloak of that infallibility, and it cannot, unless statute has otherwise provided, be sued in the courts. The law, indeed, is thick with all manner of survivals. For practical purposes, the Elder Brethren of Trinity House are under the jurisdiction of the Admiralty and the Board of Trade; but they are, in origin, a private body, and their acts thus render them liable to answer to the law.[26] So, too, for certain purposes, the Secretary of State for India in Council is the successor of the East India Company, and where those purposes are concerned the courts will take cognizance of his acts;[27] but if the reader of Ma-

[25] This will be clear to anyone who follows the questions and speeches of Mr. Pemberton Billing through the Parliamentary Debates for 1917 and 1918.

[26] Gilbert *v.* Trinity House, 17 Q. B. D. 795 (1886); Cairn Line *v.* Trinity House, [1908] 1 K. B. 528.

[27] Jehanger M. Cursetji *v.* Secretary of State for India in Council, 1 L. R. 27 Bomb. 189 (1902).

caulay is tempted to think that Clive and Warren Hastings did not hesitate, on occasion, to perform sovereign functions, he yet must legally remember that the company was not technically a sovereign body.[28] There is thus a definite environment which surrounds each seeming exception to the general rule. If there is limitation, it is that act of grace which continental theorists have taught us to deduce from the inherent wisdom of the sovereign power.[29] But the exceptions are relatively few in number, and, for the most part, they cautiously reside within the narrow field of contract.

The broad result is, to say the least, suggestive. Until 1907, and then only as a result of statute, no government department could be sued for violation of the very patent of which the Crown itself is grantor.[30] The acts of the Lord-Lieutenant of Ireland, even when they involve the seemingly purposeless breaking of heads at a public meeting, are acts of state, and so outside the purview of the courts.[31] The servants of the Crown owe no duty to the public except as statute may have otherwise provided;[32] so that even where a royal warrant regulates the pensions and pay of the army, the Secretary of State for War cannot be compelled to obey it.[33] He is the agent of the Crown; and only the Crown can pass upon the degree to which he has fulfilled the terms of his agency. Yet, in sober fact, that is to make his acts material for the decision of his colleagues, and, in an age of collective cabinet responsibility, thus to make him judge in his own cause. Sir Claude Macdonald may, as Commissioner for the Nigerian Protectorate, engage Mr. Dunn as consul for a period of three years; but if he chooses to dismiss Mr. Dunn within the specified limit, even the question of justification is beyond the competence of the courts.[34] Nor will the law inquire whether adequate examination has been made before the refusal of a petition of right; the Home Secretary's discretion is here so absolute that the judge will even hint to him that the oath of official secrecy is jeopard-

[28] Moodaly *v.* Moreton, 2 Dick. 652 (1785).
[29] *Cf.* my AUTHORITY IN THE MODERN STATE, Chap. I.
[30] Feather *v.* Regina, 6 B. & S. 257 (1865).
[31] Sullivan *v.* Earl Spencer, Ir. Rep. 6 C. L. 173 (1872).
[32] Gidley *v.* Palmerston, 3 B. & B. 275 (1822).
[33] *Ibid.*
[34] Dunn *v.* Macdonald, [1897] 1 Q. B. 555.

ized when he remarks that he considered and refused the petition.[35] A captain of the Royal Navy may burn the schooner of a private citizen in the mistaken belief that she is engaged in the slave trade, and even if the vessel so destroyed were its owner's sole means of livelihood, he is left without remedy so far as the Crown is concerned.[36] Neither Mr. Beck nor Mr. Edalji had rights against the Crown for long years of mistaken imprisonment.[37] So, too, it did not assist Miss Bainbridge when a duly accredited agent of the Crown injured her in his progress; what was left her was a worthless remedy against a humble wage earner from whom no recovery was possible.[38]

It is the realm of high prerogative that we have entered; and it would be perhaps less arid if it but possessed the further merit of logical arrangement. The truth is that in its strictest rigor the system is unworkable; and from ancient times an effort has been made to mitigate the severities it involves. The origin of the Petition of Right is wrapped in no small obscurity;[39] but its clear meaning is an ungracious effort to do justice without the admission of a legal claim. Nor is the remedy at all broad in character, for the Crown is avaricious where to show itself generous is to compromise the Exchequer. The Petition of Right is limited to a definite class of cases. Until 1874 it could be used for the recovery of some chattel or hereditament to which the suppliant laid claim; and it was only in that year that the genius of commercial understanding by which Lord Blackburn was distinguished secured its extension to the general field of contract.[40] Even when judgment has been obtained no execution can issue against the Crown. The petitioner remains dependent upon a combination of goodwill and the moral pressure he may hope to secure from public opinion.

The matter is worth stating in some little detail. "The proceeding by petition of right," said Cottenham, L. C.,[41] "exists only for the purpose of reconciling the dignity of the Crown and the

[35] Irwin *v.* Gray, 3 F. & F. 635 (1862).
[36] Tobin *v.* Regina, 14 C. B. (N. S.) 505 (1863).
[37] For a French attempt to remedy this defect, see *infra.*
[38] Bainbridge *v.* Postmaster-General, *supra.*
[39] CLODE, PETITION OF RIGHT, Chap. I.
[40] Thomas *v.* Regina, L. R. 10 Q. B. 31 (1874).
[41] Monckton *v.* Attorney-General, 2 Mac. & G. 402 (1850).

rights of the subject, and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights." A later definition is even more precise in its limitations. "The only cases," said Cockburn, C. J.,[42] "in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution; or, if restitution cannot be given, compensation in money; or where the claim arises out of contract as for goods supplied to the Crown, or to the public service. It is only in such cases that instances of petitions of right having been entertained are to be found in our books." The remedy is thus the obvious expression of the needs of a commercial age. The Crown must do business, and it must obey the rules that business men have laid down for their governance if it desire effective dealings with them. So leasehold property,[43] demurrage under a charter-party,[44] duties of all kinds paid by mistake,[45] property extended by the Crown to answer a Crown debt,[46] are all cases in which it is clear enough that the petition will lie; and, in various cognate directions, the privilege has been developed by statute.[47] In mixed cases of tort and contract the issue seems largely to depend upon the skill and subtlety of opposing counsel.[48]

Once the realm of contract is overpassed the remedy of petition ceases to be effective. Tort lies completely outside the region of responsibility. The negligence of Crown servants may destroy the Speaker's property,[49] as the zeal of a naval captain may destroy Mr. Tobin's schooner; the Crown may, without authorization, infringe Mr. Feather's patent,[50] or see its officers act wrong-

[42] Feather *v.* Regina, 6 B. & S. 257, 293 (1865).

[43] *In re* Gosman, 15 Ch. D. 67 (1880), confirmed in part 17 Ch. D. 771 (1881).

[44] Yeoman *v.* Rex, [1904] 2 K. B. 429.

[45] Percival *v.* Regina, 3 H. & C. 217 (1864) (probate); Dickson *v.* Regina, 11 H. L. C. 175 (1865) (excise); Winans *v.* Rex, 23 T. L. R. 705 (1907) (estate duties), are sufficient instances of the kind.

[46] *In re* English Joint Stock Bank W. N. 199 (1866).

[47] *E. g.*, under the Telegraph Acts. Great Western Railway *v.* Regina, 4 T. L. R. 383 (C. A.) (1889).

[48] *E. g.*, Clarke *v.* Army and Navy Co-operative Society, [1903] 1. K. B. 155–56.

[49] Canterbury *v.* Attorney-General, 1 Ph. 306 (1843).

[50] Feather *v.* Regina, 6 B. & S. 257 (1865).

fully at a court-martial;[51] in none of these cases will a petition lie. The Crown may ask for volunteers and form them into regiments; but the regimental funds are Crown funds and the colonel's errors do not render them liable.[52] Nor are these the hardest cases. Arrears of pay due to naval and military officers cannot be recovered;[53] an alteration in the establishment may place an army surgeon upon the half-pay list without claim of compensation;[54] both here and in the unreported case of *Ryan* v. *R.*[55] no inability in the petitioner was suggested. They are servants of the Crown, and the Crown has the general right to dismiss any member of the military establishment without compensation of any kind.[56] Not, indeed, that this power is limited to a field where a special case for expediency might perhaps be made out. The Superannuation Act[57] expressly reserves to the Treasury and the various government departments their power to dismiss any public servant without liability of any kind. Except where ancient office is concerned,[58] there is no such thing as wrongful dismissal from the service of the Crown,[59] and even where there is statutory provision against dismissal, the royal prerogative to abolish the office remains.[60] It is, clearly, impossible to make a contract that will bind the Crown against its will;[61] and as in the case of the French *fonctionnaires*, the Civil Service is left to its collective strength if it is to protect itself against the spider's web of public policy.[62]

III

The protection taken to the Crown has not, in general, been extended to public officers. "With us," says Professor Dicey,[63]

[51] Smith *v.* L. A. 25 R. 112 (1897).

[52] Wilson *v.* 1st Edinburgh City Royal Garrison Artillery, [1904] 7 F. 168.

[53] Gibson *v.* East India Co., 5 Bing. (N. C.) 262 (1839); Gidley *v.* Palmerston, 3 Ba. & B. 275 (1822).

[54] *In re* Tufnell, 3 Ch. D. 164 (1876).

[55] ROBERTSON, CIVIL PROCEEDINGS AGAINST THE CROWN, 357.

[56] Grant *v.* Secretary of State for India in Council, 2 C. P. D. 445 (1877).

[57] 4 & 5 WILL. IV, c. 24, § 30.

[58] On which see Slingsby's Case, 3 Swanst. 178 (1680).

[59] Shenton *v.* Smith, [1895] A. C. 229.

[60] Young *v.* Waller, [1898] A. C. 661.

[61] Dunn *v.* Regina, 1 Q. B. 116.

[62] *Cf.* my AUTHORITY IN THE MODERN STATE, Chap. V.

[63] LAW OF THE CONSTITUTION, 8 ed., 189.

"every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." No one can doubt the value of this rule, for it constitutes the fundamental safeguard against the evils of bureaucracy. Nor have its results been of little value. A colonial governor [64] and a secretary of state [65] have been taught its salutary lesson; and it is, as a learned commentator has pointed out,[66] that which makes for the distinction between the policemen of London and the policemen of Berlin. It has the merit of enforcing a far more strict adherence to law than is possible within the limits of any other system. It restrains those notions of state prerogative which have an uncomfortable habit of making their appearance in the courts of the Continent. Nothing, at least on the surface of things, is more liable to make an official careful than the rule that he cannot make his superior liable for the act of which he has been guilty.[67]

Yet there are obvious difficulties about this system which must make us cautious about its too enthusiastic acceptance. Not only do immunities exist, but there is a broad field of discretion within which the courts do not venture interference. The plea of act of state is, of course, a final bar against all action; though when it operates so as to prevent government from paying to certain persons money received under treaty for that specific purpose,[68] it is not clear that the result is all gain. It is justifiable enough that an official should not be made liable for a contract he has made on behalf of the Crown; [69] nor, on a similar ground, for money erroneously paid to him as its agent.[70] Here the real onus of our grievance lies clearly against that principal whose *a priori* infallibility is in law assumed. The problem of irresponsibility for advice given to the Crown is more difficult; [71] for the actual organization of political life makes it well-nigh impossible to separate the particular facts involved from the general policy

[64] Mostyn *v.* Fabrigas, Cowp. 161 (1774); Musgrave *v.* Pulido, 5 A. C. 102 (1879).
[65] Entick *v.* Carrington, 19 St. Tr. 1030 (1765).
[66] 1 Hatschek, *Englische Staatsrecht*, 93.
[67] Raleigh *v.* Goschen, 1 Ch. 73 (1898).
[68] Barclay *v.* Russell, 3 Ves. 424, 431 (1797).
[69] See Palmer *v.* Hutchinson, 6 A. C. 619 (1881), where the cases are reviewed.
[70] Whitbread *v.* Brooksbank, 1 Cowp. 66 (1774); Sadler *v.* Evans, 4 Burr. 1984 (1766).
[71] West *v.* West, 27 T. L. R. 476 (1911).

of the government. Nor is there liability for a tort done in the exercise of a discretion conferred by law, so long as there is an absence of malice or improper motive.[72] The courts are unwilling, and with obvious reason, to substitute their own view of policy for that of the recognized agents of administration. So, too, protection must be afforded to the police or the proper execution of a warrant;[73] it would be intolerable if a mere defect of technical procedure brought with it liability to an unconscious agent who was also the humblest minister of the law.

Far more questionable is the refusal to enforce liability against an officer for the torts of his subordinate. Problems of public policy apart, the negligence of a postman ought not less to affect the Postmaster-General [74] than the stupidity of a teacher may affect her employers.[75] If there is to be equality before the law in any fundamental sense, there must be equality in the persons affected by its application; and the irresponsibility of a government official in this aspect is, at bottom, excused only by introducing exactly that notion of state which it is the purpose of the rule of law to avoid. Nor, save on similar grounds, can the Public Authorities Protection Act be defended; [76] for what, essentially, it does is to put certain officials on a different footing from other men. Both these categories of protection raise here the general question that is involved. The obvious aim of the system is to prevent the individual official from violating the law. It does not, as on the Continent, look to the sufferer's loss. It simply insists that if an official has made a legal mistake he must pay for it. But it is, to say the least, far from clear whether the rule results in justice. To throw upon a humble man the burden of a mistake he commits to the profit of another is surely hard measure. There will, for the most part, be no adequate opportunity for the complainant to have adequate remedy. Broadly speaking, it must be enough for him that he has vindicated a principle otherwise left empty. Nor does the protection come, damages apart, where it is most needed. For the main business of the

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[72] Tozer *v.* Child, 7 E. & B. 377 (1857).
[73] 24 GEO. II, c. 44 (1751).
[74] Lane *v.* Cotton, 1 Ld. Raym. 646 (1701).
[75] Smith *v.* Martin, [1911] 2 K. B. D. 775.
[76] 56 & 57 VICT. c. 61.

ordinary citizen who wreaks his vengeance upon an unconscious offender is to reach those superiors whom the law does not permit him to touch. No protection is offered against the negligence or stupidity of an official so long as he keeps within the strict letter of his statute. His order may be wanton or arbitrary, but it is law. The burden of its error will fall upon the humble official who acts rather than upon the man in office who issues a valid order. The system may, as Mr. Lowell has aptly said,[77] make liberty depend upon law, but it is a liberty which denies regard to that equality fundamental to its operation.

It intensifies, moreover, the tendency of the state to escape the categories of law. For, by emphasizing a remedy that is in no real sense substantial, it conceals the real defects involved in the system. It is true, of course, that the number of officials to whom the system applies is smaller than on the Continent; for the English state does not throw the cloak of its sovereignty about its local constituents. But the number of officials is growing; [78] and the real problem is simply the maxim of whether a principal should be responsible for the acts of his agent. In private law, that is obvious enough; yet the state, by a subterfuge, escapes its operation. The protection of individual rights is not maintained except at the expense of other individuals; where the real point at issue is to maintain them at the expense of the illegally assumed rights of the state. For, theory apart, the Crown has not less acted when a colonel mistakenly orders his men to fire upon a mob than when the King by his signature turns a bill into an Act of Parliament.

The lack, again, of any control over acts that are technically legal is thrown into clearer relief by the recent development of administrative law. Indeed, it may be here suggested that what that development essentially reveals is the limitation of the rule of law where the rule operates in the presence of an irresponsible state. If, under the Second Empire, the Napoleonic police arbitrarily suppress a newspaper,[79] or destroy the proof-sheets of a work by the Duc d'Aumale,[80] it is not difficult to perceive that the invasion of individual liberty, where no cause save the will

[77] 2 LOWELL, GOVERNMENT OF ENGLAND, 503.
[78] *Cf.* WALLAS, THE GREAT SOCIETY, 7.
[79] DALLOZ, 1856, III, 57. [80] *Ibid.*, 1867, III, 49.

of government is shown, is, in fact, most serious. A state, in brief, the officials of which can act without the proof of reasonableness inherent in the methods of their policy, has gone far to destroy the notion which lies at the basis of law.

This recent development has, indeed, a history that goes back to the tendency of the official to show deep dissatisfaction with the slow-moving methods of the law. The technicalities of the Merchant Shipping Act, for instance, actually operate, so we are told,[81] to make its provisions for detaining unseaworthy ships substantially null and void. Effort has in recent years been made to free the administrative process from the hampering influence of the rule of law. Where, a generation ago, Parliament laid down with strict minuteness the conditions of taxation, to-day the Board of Customs and Excise has practically legislative powers.[82] "Wise men," said Sir Henry Taylor in a remarkable sentence,[83] "have always perceived that the execution of political measures is in reality the essence of them"; and it is this which makes so urgent the rigorous regard of executive practice. In the stress of conflict, perhaps, cases like *R.* v. *Halliday*[84] may be pardoned; though it is well even there to consider whether the end the means is to serve may not be lost sight of in the means a narrow expediency seems to dictate.[85] But a far wider problem is set in the Arlidge case.[86] For here, in fact, not only is the court excluded from the consideration of an administrative decision, but the tests of judicial procedure which have been proved by experience are excluded without means at hand to force their entrance. What, broadly, the Arlidge case means is that a handful of officials will, without hindrance from the courts, decide in their own fashion what method of application an Act of Parliament is to have. And where the state that is acting through their agency is an irresponsible state, we have in fact a return to those primitive methods of justice traditionally associated with the rough efficiency of the Tudor age.[87]

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[81] DICEY, LAW OF THE CONSTITUTION, 8 ed., 393.

[82] Fourth Report of the Royal Commission on the Civil Service (1914), Cd. 7338, 28.

[83] THE STATESMAN, 89.

[84] [1917] A. C. 260.

[85] *Cf.* Lord Shaw's dissent in Rex *v.* Halliday, *supra.*

[86] [1915] A. C. 120.

[87] *Cf.* Pound, Address to the New Hampshire Bar Association, June 30, 1917.

This is not to say that administrative law represents a mistaken evolution. The most striking change in the political organization of the last half century is the rapidity with which, by the sheer pressure of events, the state has been driven to assume a positive character. We talk less and less in the terms of nineteenth-century individualism. The absence of governmental restraint has ceased to seem the ultimate ideal. There is everywhere almost anxiety for the extension of governmental functions. It was inevitable that such an evolution should involve a change in the judicial process. Where, for example, great problems like those involved in government insurance are concerned, there is a great convenience in leaving their interpretation to the officials who administer the Act. They have gained in its application an expert character to which no purely judicial body can pretend; and their opinion has a weight which no community can afford to neglect. The business of the state, in fact, has here become so much like private business that, as Professor Dicey has emphasized,[88] its officials need "that freedom of action necessarily possessed by every private person in the management of his own personal concerns." So much is tolerably clear. But history suggests that the relation of such executive justice to the slow infiltration of a bureaucratic regime is at each stage more perilously close; and the development of administrative law needs to be closely scrutinized in the interests of public liberty. If a government department may make regulations of any kind without any judicial tests of fairness or reasonableness being involved, it is clear that a fundamental safeguard upon English liberties has disappeared. If administrative action can escape the review of the courts, there is no reality in official responsibility; and cases like *Entick* v. *Carrington* [89] become, in such a contest, of merely antiquarian interest. If the Secretary of State, under wide powers, issues a regulation prohibiting the publication of any book or pamphlet he does not like without previous submission to a censor, who may suppress it without assignment of cause, the merest and irresponsible caprice of a junior clerk may actually be the occasion for the suppression of vital knowledge; [90] nor will there

[88] 31 L. QUART. REV. 148, 150.

[89] 19 ST. TR. 1030.

[90] Defence of the Realm Act, Order No. 51. *Cf.* The London *Nation*, § 8, 1917.

be the means judicially at hand for controlling the exercise of such powers. The legislative control that misuse will eventually imply is so slow in coming that it arrives almost always too late. And the cabinet system, with its collective responsibility, virtually casts its enveloping network of protection about the offender. A member of Parliament may resent the stupid imprisonment of a distinguished philosopher; but his resentment will rarely take the form of turning out the government as a protest.[91]

In such a situation, it is obvious that we must have safeguards. It is not adequate to give a half-protection in the form of the rule of law, and then to destroy the utility of its application. What, in fact, is implied in a state which evades responsibility is, sooner or later, the irresponsibility of officials immediately the business of the state is complex enough to make judicial control a source of administrative irritation. Administrative law, in such an aspect, implies the absence of law; for the discretion of officials sitting, as in the Arlidge case, in secret, cannot be called law. What is needed is rather the frank admission that special administrative courts, as on the Continent, are needed, or the requirement of a procedure in which the rights of the private citizen have their due protection.[92] What, in any case, is clear is the fact that the official will not, in any other way, be substantially subject to the rule of law. In the vital case the avenue of escape is sufficiently broad to make legal attack of little use. It is hardly helpful to be able to bring a policeman into court if the real offender is the Home Secretary. It is utterly useless even to make protestation if the government is, by virtue of its growing business, to take its acts from the public view. Growing functions ought rather to mean growing responsibility than less; and if that should involve a new system of rights it makes thought about its content only the greater need. The ordinary citizen of to-day is so much the mere subject of administration that we cannot afford to stifle the least opportunity of his active exertions. The very scale, in fact, of the great society is giving new substance to Aristotle's definition of citizenship.

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[91] On the private member's protest, *cf.* LOW, GOVERNANCE OF ENGLAND, 5 ed., Chap. IV.

[92] As in the United States. New York *v.* Public Service Commission, 38 Sup. Ct. Rep. 122 (1917).

IV

The America which a Revolution brought into being did not relinquish the rights surrendered by George III at Versailles. If the people is to be master in its own house, it will not belittle itself and cease, in consequence, to be sovereign. Rights here, as elsewhere, are to flow from the fount of sovereign power; and its irresponsibility is the natural consequence. That the state is not to be sued, in truth, is taken, even by the greatest authority, as a simple matter of logic. "A sovereign," says Mr. Justice Holmes,[93] "is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Nor did Mr. Justice Holmes fail to draw the inevitable conclusion from that attitude. The sovereignty of the people will mean, in actual terms of daily business, the sovereignty of its government.[94] "As the ground is thus logical and practical," he said, "the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property from which persons within the jurisdiction derive their rights." Here is the Austinian theory of sovereignty in all its formidable completeness; though it is worth while noting that its complications have elsewhere driven Mr. Justice Holmes to the enunciation of a doctrine of quasi-sovereignty that the hardness of the rule might suffer mitigation.[95] No such certainty, indeed, existed in the early days of the Republic; and Chief Justice Jay and Mr. Justice Wilson regarded the immunity of the state from suit as the typical doctrine of autocratic government.[96] But, from the time of *Cohens* v. *Virginia*,[97] the doctrine of non-suability has taken firm hold; and men such as Harlan, J., have urged it with almost religious fervor.[98]

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[93] Kawananakoa *v.* Polyblank, 205 U. S. 349 (1907).

[94] *Cf.* my paper on "The Theory of Popular Sovereignty" in the MICH. L. REV. for January, 1919.

[95] Georgia *v.* Tenn. Copper Co., 206 U. S. 230 (1907).

[96] Chisholm *v.* Georgia, 2 Dall. (U. S.) 419 (1793).

[97] 6 Wheat. (U. S.) 264, 382 (1821).

[98] *Cf.*, for instance, United States *v.* Texas, 143 U. S. 621 (1892), and Fuller, C. J., in Kansas *v.* United States, 204 U. S. 331 (1907).

The result is that, broadly speaking, the situation is hardly distinct in its general outlines from that of Great Britain. In eight of the states there is actual constitutional provision against suit; and in sixteen more special privileges are erected as a tribute to its sovereign character.[99] It is, in short, the general rule that a state will not be liable for acts which, were they not, directly or indirectly, acts of the government, would render the doer responsible before the courts.[100] The United States will abuse the patents of its citizens hardly less cheerfully than the British Admiralty.[101] State duties, like prison maintenance[102] and the repair of roads,[103] may be done without reference to the neglect of private interests. The rule goes even further and protects a charitable institution like an agricultural society from the accidents that happen in the best-regulated fairs.[104] If the state leases an armory for athletic purposes and has failed, through sheer negligence, to repair a defective railing,[105] it does not, to say the least, seem logical to refuse compensation, especially when damages may be obtained in a similar case from a municipal body.[106] But a sovereign is perhaps unamenable to the more obvious rules of logic.

Nor has America made substantial departure from the British practice in regard to ministerial responsibility. Only one case against the head of an executive department seems to exist, and it was decided adversely to the plaintiff.[107] Nor are purely ministerial officials held responsible for actions following upon instructions legal upon their face;[108] and that although the officer may be convinced that the instruction in fact breaks the law.[109] The

[99] BEARD, INDEX OF STATE CONSTITUTIONS, 1360.

[100] Murdock Parlor Grate Co. *v.* Commonwealth, 152 Mass. 28, 24 N. E. 854 (1890).

[101] Belknap *v.* Schild, 161 U. S. 10 (1896).

[102] Moody *v.* State Prison, 128 N. C. 12, 38 S. E. 131 (1901).

[103] Johnson *v.* State, 1 Court of Claims (Ill.), 208.

[104] Berman *v.* State Agricultural Society of Minnesota, 93 Minn. 125, 100 N. W. 732 (1904).

[105] Riddoch *v.* State, 68 Wash. 329, 123 Pac. 450 (1912).

[106] Little *v.* Holyoke, 177 Mass. 114, 58 N. E. 170 (1900). I owe my knowledge of this and the other state cases in America to the brilliant article of Mr. R. D. Maguire, 30 HARV. L. REV., 20 *ff.*

[107] Stokes *v.* Kendall, 3 How. (U. S.) 87 (1845).

[108] Erskine *v.* Bohnbach, 14 Wall. (U. S.) 613 (1871).

[109] Wall *v.* Trumbull, 16 Mich. 228 (1867); Underwood *v.* Robinson, 106 Mass. 296 (1871).

law, indeed, has many anomalies about it. A company which serves as a mail carrier is not responsible to the owner of a package for its loss;[110] it is here an agent of government, and so, as it seems, protected from the consequences of its acts. But a mail contractor will be liable for the negligence of the carrier whom he employs.[111] Once an official engages a private servant to perform a task, the ordinary rules of principal and agent are said to apply.[112] Certain mystic words are here, as elsewhere, the vital point in the evasion of law.

Such facts converge towards an argument first stated in a distinct form by Paley. "Sovereignty," he says,[113] "may be termed absolute, omnipotent, uncontrollable, arbitrary, despotic, and is alike so in all countries." Certainly the forms of government could in no two countries remain more substantially distinct than those of England and the United States; yet, in each, the attributes of sovereign power admit no differentiation. What mitigation there is of a rule hard alike in intent and execution is the mitigation of the sovereign's generosity; that is to say, a mitigation which stops short where the Treasury becomes concerned. For this theory of an auto-limitation of the sovereign's power has in fact nothing of value to contribute to our problems. The real need is the enforcement of responsibility, and that cannot be effected if the test is to be our success in convincing the sovereign power of its delinquencies. The fact is that here, as elsewhere, the democratic state bears upon itself the marks of its imperial origin. The essence of American sovereignty hardly differs, under this aspect, from the attributes of sovereignty as Bodin distinguished them three centuries ago.[114] What emerges, whether in England or in the United States, is the fact that an Austinian state is incompatible with the substance of democracy. For the latter implies responsibility by its very definition; and the Austinian system is, at bottom, simply a method by which the fallibility of men is concealed imposingly from the public view.

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[110] Bankers' Mutual Casualty Co. *v.* Minneapolis, etc. Ry., 117 Fed. 434 (1902).

[111] Sawyer *v.* Corse, 17 Gratt. (Va.) 230 (1867).

[112] Dunlop *v.* Munroe, 7 Cranch (U. S.) 242 (1812).

[113] MORAL AND POLITICAL PHILOSOPHY, Bk. VI, Chap. VI. *Cf.* my AUTHORITY IN THE MODERN STATE, 29 *f.*

[114] DE LA RÉPUBLIQUE, I, 8, 9. *Cf.* CHAUVIRÉ, BODIN, 311 *f.*

V

The Anglo-American system exists in isolation; and it is, in a sense, the only one which has remained true to the logical conditions of its origin. In France and Germany a régime exists which, while in no sense antithetic, may be usefully contrasted with the more logical effort here discussed.[115] No text, indeed, declares in France the responsibility of the state; such concession to the historic content of sovereign power is here, as elsewhere, deemed fundamental. But the courts have little by little been driven through circumstances to desert this rigidity, so that in the France of to-day the older notion of irresponsibility is no longer existent. The state, indeed, is in nowise liable for the consequence of its legislative acts; though the demand for compensation in cases where a state monopoly has been created are not without their interest. Nor must we miss the significance of ministerial protest against the easy thesis that the obligations of the state are liable to instant change by statute.[116]

What is perhaps more significant than the substance of the decisions is the manner in which this jurisprudence has been evolved. We start, as in England, with an irresponsible state. Little by little a distinction is made between the acts of the state in its sovereign capacity, where irresponsibility remains, and in its non-sovereign aspect, where liability is assumed. But it has been in the last decade seen that such distinction is in fact untenable and that the test of liability must be sought in different fashion. While, therefore, the sovereignty of the state finds its historic emphasis within the chamber,[117] it is less and less insistent before the Council of State. And even within the Chamber suggestions of a notable kind have been made. It was M. Clemenceau who proposed statutory compensation for unlawful arrest;[118] and a vote of credit for this purpose has been made in every budget since 1910.

[115] The literature of the responsibility of the state in France and Germany is now enormous. The two best treatises on the former country are those of Teissier and Tirard. On Germany the best general discussion is still that of OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT, Bk. III, § 17. *Cf.* also LOENING, DIE HAFTUNG DES STAATES.

[116] DUGUIT, LES TRANSFORMATIONS DU DROIT PUBLIC, 235–39 (a translation of this work will be shortly published).

[117] *Cf.* my AUTHORITY IN THE MODERN STATE, Chap. V.

[118] DUGUIT, *op. cit.*, 252.

Here, at least, is a clear admission that the sovereign state is a fallible thing.

But a more notable change even than this may be observed. The administration has become responsible for faults in the exercise of its functions. There has been evolved, if the phrase may be permitted, a category of public torts where the state becomes liable for the acts of its agents. And this is, in fact, no more than the admission of that realism which, in the Anglo-American system, has no opportunity for expression. For every state act is, in literal truth, the act of some official; and the vital need is simply the recognition that the acts of an agent involve the responsibility of his superior. Where the service of the state, that is to say, is badly performed in the sense that its operation prejudices the interest of a private citizen more especially than the interests of the mass of men, the exchequer should lie open for his relief. Obviously enough a responsibility stated in these terms becomes no more than equitable adjustment. If the state comes down into the market-place it must, as even American courts have observed,[119] put off its robe of sovereignty and act like a human being.

This modern development goes back to a distinguished jurist's criticism of the Lepreux case in 1899.[120] Lepreux was injured by the state-guard in the performance of its duties; and his plea for damages was rejected on the ground that it was an inadmissible attack on the sovereignty of the state. M. Hauriou argued that this was the coronation of injustice. He did not deny that there are cases where public policy demands irresponsibility; but he urged, in effect, that in the general business of daily administration negligence ought, as with the relations of private citizens, to have its due consequence. The result of his argument was seen in the next few years. In the Grecco case, for example, though the plaintiff was unsuccessful, the ground of his failure was not the irresponsibility of the state, but the fact that he had not proved his claim of negligence.[121] It was thus admitted that the state was not infallible, and the way lay open to a striking devel-

[119] Charleston *v.* Murray, 96 U. S. 432 (1877); United States Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904 (1824); The Royal Acceptances, 7 Wall. (U. S.) 666 (1868).

[120] SIREY, 1900, III, 1.

[121] *Ibid.*, 113.

opment. The Council of State was willing to insist upon damages for an unduly delayed appointment of a retired soldier to the civil service; it held the state responsible for the faulty construction of a canal.[122] Most remarkable of all was perhaps the Pluchard case in which a civilian obtained damages for a fall occasioned by an involuntary collision with a policeman in pursuit of a thief.[123] Nor has the evolution stopped there. It has become possible to overturn governmental ordinances — the analogue of the English provisional order; or, at least, to obtain special compensation where hardship in the application of the ordinance can be proved.[124] What practically has been established is governmental responsibility where the administrative act is in genuine relation to the official's duty. It is only where, as in the Morizot case,[125] the official goes clearly outside his functions that the state repudiates liability.

No one will claim for this French evolution that it has been the result of a conscious effort to overthrow the traditional theory of sovereignty; on the contrary, its slow and hesitating development suggests the difficulties that have been encountered.[126] But no French court will say again, as in the Blanco case,[127] that problems of state are to be ruled by special considerations alien to the categories of private law. The real advantage, indeed, of the system is its refusal to recognize, within, at least, the existing limits of this evolution, any special privilege to the state. It judges the acts of authority by the recognized rules of ordinary justice. It asks, as it is surely right to ask, the same standard of conduct from a public official as would be expected from a private citizen. The method may have its disadvantages. There is undoubtedly a real benefit in the Anglo-American method of bringing the consequences of each act rigidly to bear upon the official responsible for it. Yet, as has been shown, this theory is far different from the application of the rule in practice; it does

[122] *Cf.* DUGUIT, *op. cit.*, 261.

[123] RECUEIL (1910), 1029.

[124] SIREY, 1908, III, 1, and see the account of the Turpin case in DUGUIT, *op. cit.*, 266, for the application of responsibility to ministerial negligence of a special kind.

[125] SIREY, 1908, III, 83.

[126] The Ambrosini case, for example, SIREY, 1912, III, 161, suggests a revulsion of sentiment.

[127] HAURIOU, PRÉCIS DE DROIT ADMINISTRATIF, 8 ed., 503, note 1.

not affect those upon whom the cloak of sovereignty is thrown; and it offers no prospect of any full relief to the person who has been prejudiced. These evils, at least, the French method avoids. It conceives of the state as ultimately no more than the greatest of public utilities, and it insists that, like a public utility in private hands, it shall act at its peril. In an age where government service has been so vastly extended, the merit of that concept is unquestionable.

It may, of course, be argued that such an attitude is only possible in the special environment of French administrative law. That system is, as Professor Dicey has taught us in his classical analysis,[128] essentially a system of executive justice, basically incompatible with the ideals of Anglo-American law. Yet there are many answers possible to that attitude. French administrative law may be in the hands of executive officials; but no one who has watched its administration can urge a bias towards the administration on the part of the Council of State.[129] Nor, if the fear remain, need we insist upon the rigid outlines of the French inheritance. The Prussian system of administrative law is administered by special courts, and it has won high praise from distinguished authority.[130] If it be true that the pressure of executive business makes continuous recourse to the ordinary courts impossible, the establishment of such tribunals may be the necessary and concomitant safeguard of private liberty; and Mr. Barker has pointed out that in the English umpires and referees we have the foundation upon which an adequate system can be erected.[131] Certain at least it is that in no other way than some such development can we prevent the annihilation of that sturdy legalism which was the real condition of Anglo-Saxon freedom.

VI

"It is a wholesome sight," said Maitland in a famous sentence,[132] "to see 'the Crown' sued and answering for its torts." We per-

[128] LAW OF THE CONSTITUTION, 8 ed., 324–401.

[129] *Cf.* E. M. Parker, 19 HARV. L. REV. 335. Mr. Parker gives good examples of this tendency; but I do not think he has altogether realized the substantial character of Professor Dicey's strictures.

[130] *Cf.* E. Barker, 2 POLITICAL QUART. 117.

[131] *Ibid.*, 135 *f.*

[132] 3 COLLECTED PAPERS, 263.

haps too little realize how much of historic fiction there is in the theory of the English state. Certainly there have been moments in its early development when it almost seemed as though the great maxim *respondeat superior* would apply to official persons; for in documents no less substantial than statutes the germ of official responsibility is to be found.[133] But the doctrine seems to climb no higher than the sheriff or escheator, and it is in Council or Parliament that the greater men make what answer they deem fit. And, as Maitland said,[134] we should not expect to find the medieval King a responsible officer simply because he was every inch a man. When theory develops it was thus too late. The wholesome sight is beyond our vision. The state is still the King; and if an occasional judge, more deeply seeing or blunter than the rest, tells us that our cases in fact concern not the state or the Crown but the government, a phrase used *obiter* is not strong enough to point the obvious moral.[135]

Yet obvious it is; and if, for a moment, we move from law to its philosophy the groundwork of our difficulties will be clear enough. We are struggling to apply to a situation that is at each moment changing conceptions that have about them the special fragrance of the Counter-Reformation. It is then that the absolute and irresponsible state is born, and it is absolute and irresponsible from the basic necessity of safeguarding its rights against the Roman challenge.[136] But the attributes are convenient, especially when they are in actual fact exercised by government. For then, as now, in the normal process of daily life what we in general fail to see is that acts of state are governmental acts which command the assent of the mass of men. The classic theory of sovereignty is unfitted to such a situation. The fundamental characteristic of political evolution is the notion of responsibility. If our King fails to suit us we behead or replace him; if our ministry loses its hold, the result is registered in the ballot-boxes. But the categories of law have obstinately and needlessly resisted such transformation. The government has for the most part kept the realm of administration beclouded by high notions of prerogative.

[133] STATUTE OF WESTMINSTER II, 13 EDW. I, St. I, chap. 2, § 3 (1285); ARTICULI SUPER CARTAS, § 18.

[134] 3 COLLECTED PAPERS, 247.

[135] Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93, 111, per Blackburn, J.

[136] *Cf.* my AUTHORITY IN THE MODERN STATE, 22 *f.*

What is here argued is the simple thesis that this is legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty, however conceived, is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice.

It would not persist but for the use of antiquarian terminology. The Crown is a noble hieroglyphic; and it is not in the Law Courts that effort will be made to penetrate the meaning of its patent symbolism. Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the state behind them. They are fallible beings because they are human, and if they do wrong it is in truth no other derogation than the admission of their human fallibility to force responsibility upon the treasury of their principal. To avoid that issue results not merely in injustice. It makes of authority a category apart from the life that same authority insists the state itself must live. By its sanctification of authority it pays false tribute to an outworn philosophy. "Whatever the reasons for establishing government," said James Mill,[137] "the very same are reasons for establishing securities." It is this absence of safeguards that makes inadequate the legal theory our courts to-day apply. Nor has it even the merit of consistency; for the needs of administration have necessitated governmental division into parts that may or may not be sovereign or irresponsible without regard to logic. The cause of this moral anachronism may be imbedded in history; but we must not make the fatal error of confounding antiquity with experience. We live in a new world, and a new theory of the state is necessary to its adequate operation. The head and center of practical, as of speculative effort, must be the translation of the facts of life into the theories of law. The effort to this end is slowly coming; but we have not yet taken to heart the burden of its teaching. The ghost of old Rome, as in Hobbe's masterpiece of phrase, still sits in triumph upon ruins we might fashion anew into an empire.

Harold J. Laski.

HARVARD UNIVERSITY.

[137] Essays reprinted from the Encyclopedia Britannica, 5.